In the Supreme Court of the United States

OCTOBER TERM, 1972

No. 72-941

JOSEPH LUGOSCH, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The order of the court of appeals affirming the judgment of conviction (Pet. App. A) was entered without opinion.

JURISDICTION

The judgment of the court of appeals was entered on December 13, 1972. The petition for a writ of certiorari was filed December 29, 1972. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether the indictment identified the victims of the extortion scheme and the dates on which the offenses were committed with sufficient particularity.

2. Whether petitioner's confession was the product of improper government inducements.

3. Whether the alleged kickbacks involved here affected interstate commerce within the meaning of the Hobbs Act.

4. Whether the trial court abused its discretion in limiting the time of summation by petitioner's counsel to one hour.

5. Whether the trial judge properly instructed the jury on the elements of the offense and the manner in which to weigh the evidence.

6. Whether the evidence at the trial showed that the money had been taken from the victims as a result of fear or threats induced by the co-conspirators.

STATEMENT

After a jury trial in the United States District Court for the District of New Jersey, petitioner was convicted on one count of conspiring to extort and on four substantive counts of extortion in violation of the Hobbs Act, 18 U.S.C. 1951.[1] He was sentenced to two and one-half years' imprisonment and fined $8,000 on the conspiracy count; on each of the other counts, he was sentenced to concurrent terms of two years' probation, commencing upon his release from prison, and was fined $3,000. The court of appeals affirmed without opinion (Pet. App. A).

The evidence at trial showed that petitioner, an architect for the Union County Board of Education for 10 years prior to 1972, and the members of the Board used

[1]Co-defendant Musto was also convicted at the same trial; his conviction was affirmed by the court below and he has also filed a petition for a writ of certiorari, No. 72-946.

their positions to impose a system whereby businessmen could do business with the Board only if they paid kickbacks. The testimony of three unindicted conspirators—Savarine, Fenton, and Castorino—disclosed that a group of businessmen, whom the conspirators referred to as "the club", kicked back approximately ten per cent of the money they received from their sales to the Board; the funds so collected were distributed to petitioner and to members of the Board. Representatives of thirteen firms that did business with the Board further testified that they paid the kickbacks because payment was a requirement of doing business. One of the witnesses characterized the system of official corruption as being so pervasive that it was "a way of life" (VI Tr. 1186).

ARGUMENT

1. Petitioner asserts that the indictment in this case fails to identify the victims and dates of the alleged offenses with sufficient specificity. But counts I through V, on which petitioner was found guilty (Pet. 6), include the names of firms which were victims of alleged extortionate threats and state that the alleged offenses occurred between April 1966 and December 1970. Thus the indictment apprised petitioner with sufficient particularity of the offenses for which he was being charged to protect him against double jeopardy. See, *e.g.*, *United States* v. *Kenny*, 462 F.2d 1205 (C.A. 3), certiorari denied *sub nom. Kropke* v. *United States, et al.*, Nos. 72-118, -119, -120, -121, -128, October 16, 1972; *United States* v. *Addonizio*, 451 F.2d 49 (C.A. 3), certiorari denied, 405 U.S. 936. Moreover, petitioner and his co-defendants were furnished a detailed bill of particulars containing a complete schedule of the approximate dates of the offenses and what payments were made; his claim of prejudice based on an alleged deficiency in the indictment is therefore not well

taken. See *United States* v. *De Cavalcante*, 440 F.2d 1264, 1269 (C.A. 3).

2. Petitioner next argues that his confession was the product of false government promises, and thus should not have been admitted into evidence. Petitioner was interviewed twice about kickbacks on work done for the Board.

On the first occasion, he was interviewed in the office of the Assistant United States Attorney in the presence of two F.B.I. agents (VII Tr. 1610, 1622); no notes were made of the interview (VIII Tr. 1571). Petitioner was confronted with information which implicated him in the extortion scheme (VII Tr. 1594), and was told that if he cooperated fully, the government had the option of not prosecuting (VII Tr. 1744). At trial the government did not introduce, or even attempt to introduce, anything said by petitioner during this interview.

The second interview was conducted by the F.B.I. agents at petitioner's office on December 9, 1970 (VII Tr. 1602).[2] Prior to conducting this interview, petitioner was advised fully of his *Miranda* rights and was given a waiver-of-rights form, which he read and signed (VII Tr. 1601-1603). He was then again confronted with information implicating him and he made a statement (VII Tr. 1693-1699); it is the admission of this statement that he challenges.

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[2]According to petitioner's testimony at trial the first interview had occurred some five or six weeks earlier, in October (VII Tr. 1622). One of the F.B.I. agents testified that the period between interviews was from one to three weeks (VII Tr. 1572).

Petitioner argues that the first interview was not voluntary because it was improperly induced by the statement that the government had the option of not prosecuting him; the second interview weeks later, he asserts, even though preceded by *Miranda* warnings, was the product of the first. The trial court, however, correctly determined that it was not necessary to rule on the voluntariness of the first statement, since, even if petitioner felt he was being offered immunity at the first interview, there was a sufficient difference in the nature, time, and circumstances surrounding the second interview to preclude the continuing effect of the first (VII Tr. 1694-1695). Any illegality in the first interview had dissipated. *Wong Sun* v. *United States*, 371 U.S. 471. In addition, since the second interview was prefaced by complete *Miranda* warnings and petitioner's execution of a waiver-of-rights form, petitioner was on notice when he made the incriminating statements that anything he said could be used against him. *United States* v. *Shea*, 436 F.2d 740 (C.A. 9).

3. Petitioner also contends for the first time that the government failed to establish that the kickbacks he allegedly received affected interstate commerce. But each of the substantive counts which served as the basis for petitioner's conviction involved firms engaged in construction for the Board of Education. These firms used materials moving in interstate commerce (IV Tr. 673, 768-769; V Tr. 945; VI Tr. 1104, 1159, 1313, 1339; VII Tr. 1392; XII Tr. 3713). The extortion of tribute from contractors engaged in local construction work who are dependent upon interstate commerce for materials is covered by 18 U.S.C. 1951. *Anderson* v. *United States*, 262 F.2d 764 (C.A. 8), certiorari denied, 360 U.S. 929; *Hulahan* v. *United States*, 214 F.2d 441 (C.A. 8), certiorari denied, 348 U.S. 856; see also *United States* v. *DeMasi*, 445 F.2d

251 (C.A. 2); *United States* v. *Kramer*, 355 F.2d 891 (C.A. 7), reversed on other grounds, 384 U.S. 100.

4. Petitioner objects to the court's one hour limitation on the summation to the jury by his counsel.[3] The trial judge, however, has wide discretion in limiting the time for argument to the jury. *United States* v. *Roviaro*, 379 F.2d 911 (C.A. 7); *Barnard* v. *United States*, 342 F.2d 309 (C.A. 9), certiorari denied, 382 U.S. 948; *Hodge* v. *United States*, 271 F.2d 52 (C.A. 5), certiorari denied, 361 U.S. 961; *United States* v. *Kay*, 101 F.2d 270 (C.A.2), certiorari denied, 306 U.S. 660. And a limitation granting each defendant in a multi-defendant case one hour to summarize is clearly a reasonable exercise of discretion. See *United States* v. *Gleeson*, 411 F.2d 1091 (C.A. 10), restricting several defendants to one hour jointly for closing arguments.

5. Petitioner also takes issue with certain aspects of the court's instructions to the jury.

a. He challenges the court's statement that "[a] basic question for you [the jury] to determine is whether the Government's witnesses are telling the truth or the defendants and their witnesses are telling the truth" (XII Tr. 3702-3703). This instruction, he argues, placed the burden on him to acquit himself and incorrectly required the jury to consider as truthful all the evidence on either side rather than allowing it to render a judgment on the evidence considered as a whole. But the quoted statement should not be read in isolation. The trial judge also specifically instructed the jury that the government had the burden of proving guilt beyond a reasonable doubt (XII Tr.

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[3]The government was granted one hour and forty-five minutes; each of the three defendants was granted one hour (XI Tr. 3319).

3710, 3722). He instructed them that they were to consider all the evidence that had been produced (XII Tr. 3708), to consider the case of each defendant from the evidence as to each count which may be applicable to him (XII Tr. 3706), and to consider all the instructions as a whole (XII Tr. 3702). When the challenged instruction is read in its proper context, the jury could not have been misled into believing that it had to credit only the evidence of one side or that the burden of proof was on the defendants. Moreover, the jury's conviction of petitioner and a co-defendant, while at the same time acquitting a third defendant, indicates it considered fully the evidence submitted by both sides.

b. The trial court refused to give an instruction as to whether there was more than one conspiracy. In so doing, the judge explained that since the alleged purpose of the conspiracy was to extort money from contractors and vendors at the bottom for the benefit of petitioner and Board members at the top, the mere fact that there might be several roads leading from the bottom to the top, did not make each of them a separate conspiracy (XII Tr. 3587-3588). Here the conspiracy was an agreement by the Board and petitioner to extort funds from individuals doing business with the Board. Unlike *Kotteakos* v. *United States*, 328 U.S. 750, where separate conspiracies were only connected by the participation of a single individual in all of them, the agreement here itself established a general scheme designed to encompass all of the sales charged in the indictment. See *Blumenthal* v. *United States*, 332 U.S. 539. As in *United States* v. *Kenny*, 462 F. 2d 1205 (C.A.3), certiorari denied *sub nom. Kropke* v. *United States, et al.*, Nos. 72-118, -119, -120, -121, -128, October 16, 1972, where the court determined that only one conspiracy existed, it is clear here that

none of the so-called subsidiary conspiracies would have operated except for the existence of the overall conspiracy charged in the indictment. Accordingly, the court properly declined to give the requested instruction.

c. Petitioner finally contends that if the payments were merely made to bribe the Board, there can be no extortion, and therefore the trial court erred in refusing to charge the jury as to the law of bribery. The testimony of the victims does not support the view of the petitioner that the payments were bribes or payments for preferential treatment; but even assuming there was a question about the intention generating the kickbacks, the court's charge completely covered this area. The court emphasized that the mere fact that payments were made was not alone sufficient to support a conviction; it advised that the jury would have to find in addition the payments were made under a fear of economic loss (XII Tr. 3735). Therefore, as the court stated in *United States* v. *Addonizio*, 451 F. 2d 49, 77 (C.A. 3), certiorari denied, 405 U.S. 936, since the court "adequately set forth the characteristics distinguishing bribery from extortion, [t]here was no need to instruct in detail as to an offense for which the defendants were not on trial. * * *"

6. Petitioner makes the additional contention that the evidence at trial failed to show that the money was taken as a result of fear or threats induced by the alleged conspirators. But some of the representatives of firms making the payments testifed that the kickbacks were understood as prerequisities for doing business with the Board (IV Tr. 684, 747,759; V Tr. 875-884, 954-956, 1019-1022; VI Tr. 1096-1098; VII Tr. 1358-1359, 1439); others stated they had been told to make the kickbacks if they wished to make sales to the Board (V Tr. 911-917, 1069; VI Tr. 1103-1105, 1174-1175, 1262, 1290-1293,

1312-1315). Payments made as a result of fear of financial loss are precisely what Congress intended to reach under the extortion provision of the Hobbs Act. See, *e.g.*, *United States* v. *Iozzi*, 420 F. 2d 512 (C.A. 4), certiorari denied 402 U.S. 943; *United States* v. *Tropiano*, 418 F. 2d 1069 (C.A. 2), certiorari denied, 397 U.S. 1021; *United States* v. *Kramer*, 355 F. 2d 891 (C.A. 7) reversed on other grounds, 384 U.S. 100. Contrary to petitioner's claim, the fact that in some instances the fear of economic loss was traced to the conspirators' course of conduct over several years, rather than to a specified threat made at a particular time, does not remove from the statutory prohibition the exploitation of the fear to collect kickback payments. *Callanan* v. *United States*, 223 F. 2d 171 (C.A.8), certiorari denied, 350 U.S. 862.[4]

CONCLUSION

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

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[4]Petitioner's claim that the court of appeals violated his rights in failing to write an opinion is baseless. There is no requirement that an appellate court write an opinion; obviously the court below was of the view that the issues raised were so insubstantial as not to warrant formal discussion.